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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1628

TELEPROMPTER CORPORATION and COMLEY ELECTRONICS CORPORATION,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a joint venture, JACK CHERTOK TELEVISION, INC., and DENA PICTURES, INCORPORATED,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* SUBMITTED BY MOTION PICTURE ASSOCIATION OF AMERICA, INC., *ET AL.*

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INDEX

PAGE

Motion for Leave to File Brief *Amicus Curiae* 1

Question Presented 6

Interest of *Amici* 6

Summary of Argument 10

POINT I—

The decision of the Court below is fully consistent with the economic realities of the television industry 16

1. Local, regional and national advertising revenues are dependent upon the size of the audience in the local market and not the distant market 17

2. Unrestricted importation of distant signals will have an adverse impact on the license fees which copyright owners may obtain from local stations in the receiving market 21

3. The high financial risk and large capital expenditures which characterize the motion picture industry make the payment of CATV copyright fees of critical importance 23

POINT II—

Copyright liability for the carriage of distant signals by cable systems is fully compatible with the Communications Act and the rules and policies of the Federal Communications Commission 26

PAGE

POINT III—

The decision below is in full accord with the primary purposes of the Copyright Act 38

1. CATV sells its product to the public for profit and cannot justify its infringements by claiming to be "The Public" 38

2. Payment of separate license fees for separate commercial uses of a copyrighted work is fully consistent with copyright policy and will stimulate the production of high quality television programs 39

POINT IV—

The clearance of copyrights for CATV can be worked out on the basis of precedents existing in the television program distribution market 41

1. The mechanics of program licensing could be easily worked out between an eager seller and willing buyer through the creation of clearing houses and through central buying offices for CATV 42

2. Since CATV will be an important customer of the copyright owners, they will not demand excessive fees or enter into unreasonable exclusivity agreements with broadcasters. Any abuse could be handled by appropriate government action 47

POINT V—

The viability of the cable industry is not threatened by liability for past damages or suits for injunctive relief 49

PAGE

POINT VI—

The failure of Congress to act on the cable-copyright question can be traced to the intransigence of the cable industry following this Court's decision in *Fortnightly*. An affirmance of the decision below will greatly aid the adoption of CATV copyright legislation 55

CONCLUSION 61

TABLE OF AUTHORITIES

Cases:

Cable Vision Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964) *cert. den.*, 379 U.S. 989 (1965) 27
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 14, 51
Clarksburg Publishing Co. v. FCC, 225 F.2d 511 (C.A. D.C. 1955) 35

Davis v. E. I. Du Pont de Nemours & Company, 249 F. Supp. 329 (S.D.N.Y. 1966) 52

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 27

Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932) 51

Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1966) 53
In re Network Television, 25 FCC 2d 318 (1970) 16

Markham v. Borden, 108 F. Supp. 695 (D.C. Mass. 1952) rev. o. o. gr. 206 F.2d 199 (1st Cir. 1953) 52

PAGE

National Comics Publications, Inc. v. Fawcett Publications, Inc., 198 F.2d 927 (2d Cir. 1952) 53

Shapiro Bernstein & Co. v. 4646 S. Vermont Ave. Inc., 367 F.2d 236 (9th Cir. 1966) 52

United Artists Television, Inc. v. Fortnightly Corp., 225 F. Supp. 177 (S.D.N.Y. 1966) 35

United Artists Television, Inc. v. Fortnightly Corp., 392 U.S. 390 (1968) 11, 15, 16, 20, 22, 35, 36, 50, 55, 56, 60

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 30

Woolworth Co. v. Contemporary Arts, 344 U.S. 228 (1952) 52

Ziegelheim v. Flohr, 119 F. Supp. 324 (E.D.N.Y. 1954) 52

Constitutional Provision:

United States Constitution
Article I, Section 8 27

Statutes and Rules:

Copyright Act of 1909
17 U.S.C.
Sec. 101 49
Sec. 101(b) 52
Sec. 112 53

Communications Act of 1934
47 U.S.C.
Sec. 151 et seq. 17, 26
Sec. 414 ..... 12, 27

PAGE

Sec. 303(h) 30
Sec. 307(d) 31
Sec. 308 31

Rules of the Federal Communications Commission:

47 C.F.R. § 73.606 17
47 C.F.R. § 73.614 17
47 C.F.R. § 73.683 35
47 C.F.R. § 73.685 17
47 C.F.R. § 73.689 17
47 C.F.R. §§ 74.731-32, 831-32 33
47 C.F.R. § 76.57(a)(1) 34
47 C.F.R. § 76.151(a) 34
47 C.F.R. § 76.151(b) 33

Agency Reports and Orders:

Cable Television Proposals (Letter of Intent), 31 FCC 2d 115 (1971) 29
Cable Television Report and Order, 36 FCC 2d 143 (1972) 12, 24, 28, 31, 32, 33, 56, 57, 58
Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 FCC 2d 326 (1972) 28
First Report and Order, 38 FCC 683 (1965) (Dkt. No. 14895 *et al.*) 21, 32
Second Report and Order, 2 FCC 2d 725 (1966) (Dkt. No. 15971 *et al.*) 12, 21, 29, 36
Memorandum Opinion and Order, 6 FCC 2d 309 (1967) 36
Sixth Report and Order, 17 Fed. Reg. 3905 (1952) 30, 35

PAGE

Prime Time Access Rule, 23 FCC 2d 382 (1970) 24
Hearings before the FCC in Dkt. No. 19622 (1973) 7

Congressional Material:

The Senate Study on Copyright Law Revision, No. 24, 86th Cong. 2d Sess., Sen. Comm. Print 53
113 Cong. Rec. S. 14067 (daily ed. Oct. 3, 1967) 50
Cong. Rec., Feb. 8, 1971, S. 962–S. 963 55
Cong. Rec., Mar. 26, 1973, S. 5615 55
S. 644, 91st Cong., 1st Sess. 55
Copyright Law Revision Report submitted to the House Comm. on the Judiciary (87th Cong., 1st Sess.) 52
Hearings Before The Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, on S. 1361, 93rd Cong., 1st Sess. 59, 60

Miscellaneous:

Broadcasting, March 12, 1973 54
Broadcasting, December 3, 1973 ..... 29, 60
Johnson, Dr. Leland L., "The Future of Cable Television" (1970) 19, 39, 41, 46, 48
Nimmer, *Copyright* §§154.1–154.14 (1973) 52
Sloan Commission Report, *On the Cable* (McGraw-Hill, 1971) 9
Teleprompter's Annual Report 1971 53
Teleprompter's Annual Report 1972 54
Time Magazine, August 23, 1971 7
TV Factbook, 1973-74 Ed., Services Volume 8, 33, 43, 44, 45

PAGE

U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of Economic Analysis (Survey of Current Business, National Income and Product Account of the U.S. 1929-65, 1973) 8
U.S. Industrial Outlook 1974, with Projections to 1980, U.S. Dept. of Commerce, Domestic and International Business Administration; Bureau of Competitive Assessment and Business Policy, Oct. 1973 8
Variety, June 7, 1971 9
Variety, July 22, 1973 7
Variety, October 17, 1973 7
Wall Street Journal, January 12, 1972 9
Wall Street Journal, December 5, 1973 7

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Leave to File Brief *Amicus Curiae*

Pursuant to Rules 35 and 42(3) of the Rules of this Court, Motion Picture Association of America, Inc. (MPAA), Association of Motion Picture and Television Producers, Inc. (AMPTP), Columbia Pictures Industries, Inc., MCA, Inc., Metro-Goldwyn-Mayer Inc., Metromedia Producers Corporation, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, and Warner Bros. Inc., hereinafter collectively referred to as *"Amici"*, respectfully move the Court for leave to file a brief *amicus curiae* in this case.

MPAA is a trade association whose membership comprises companies which are among the largest producers and distributors of copyrighted motion pictures in the

United States.* Each of the aforelisted companies joining in this application is engaged in the production or distribution or both, of copyrighted motion pictures for theatrical exhibition and for telecasting in the United States and elsewhere. AMPTP is a California membership corporation which comprises seventy-two (72) companies which are engaged in the production of copyrighted motion pictures.**

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* Allied Artists Pictures Corporation, Avco Embassy Pictures Corp., Columbia Pictures Industries, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Pictures, a division of Universal City Studies, Inc., Warner Bros. Inc.

** The following companies constitute the membership of AMPTP: Aaron Spelling Productions, Inc., A&S Productions, Inc., (The) Alpha Corporation, American International Productions, a California corporation, Artanis Productions, Inc., Aubrey Schenck Enterprises, Inc., Bing Crosby Productions, Inc., Brien Productions, Inc., Bristol Productions, Inc., Charleston Enterprises Corporation, Cinema Video Communications, Inc., Chrislaw Productions, Inc., Columbia Pictures Industries, Inc., Daisy Productions, Inc., Danny Thomas Productions, Darr-Don Inc., Edprod Pictures, Inc., Filmways, Inc., Formosa Productions, Inc., Four Star International, Inc., Frank Ross Productions, Geoffrey Productions, Inc., Gibraltar Productions, Inc., Hanna-Barbera Productions, Inc., Harold Hecht Company, Herbert Leonard Enterprises, Inc., Jack Chertok Television, Inc., Jack Rollins and Charles H. Joffe Productions, (The) Kappa Corporation, Lawrence Turman, Inc., Legarla, Inc., Leonard Films, Inc., Levy-Gardner-Laven Productions, Inc., Lucille Ball Productions, Inc., (The) Malpaso Company, Max E. Youngstein Enterprises, Inc., Meteor Films, Inc., Metro-Goldwyn-Mayer Inc., Metromedia Producers Corporation, Millfield Productions, Inc., (The) Mirisch Corporation of California, Mirisch Films, Inc., Mirisch Productions, Inc., Motion Pictures International, Inc., Murakami Wolf Productions Inc., NGC Television Inc., Norlan Productions, Inc., Oakmont Productions, Inc., Paramount Pictures Corporation, Pax Enterprises, Inc., Pax Films, Inc., Rainbow Productions, Inc., Rastar Enterprises, Inc., Rastar Productions, Inc., RFB Enterprises, Inc., R.F.D. Productions, Robert B. Radnitz Productions, Ltd., Sheldon Leonard Productions, Sid & Marty Krofft Television Productions, Inc., Spelling-Goldberg Productions, (The) Stanley Kramer Corporation, Stuart Millar Productions, Inc., Summit Films, Inc., T&L Productions, Inc., Tandem Productions, Inc., Thomas/Spelling Productions, Twentieth Century-Fox Film Corp., Universal City Studios, Inc., Walt Disney Productions, Warner Bros. Inc., Wolper Pictures, Ltd. Wrather Corporation.

The central issue in this case is of vital importance to the health of the motion picture industry. This issue is whether cable television systems (CATV) which import copyrighted film programs from broadcasting stations hundreds of miles distant from their own location and which distribute these programs to their own paying subscribers, are engaged in a "performance" of such programs and are liable for the payment of copyright fees for such programs.

The CATV systems owned and operated by the petitioners retransmit to their subscribers broadcasts of distant television stations containing not only the programs owned by respondents herein, but also copyrighted motion pictures produced and distributed by *Amici* and by others. The interests of *Amici* are therefore directly affected by the precedent which the decision of this Court will set for the protection of *Amici's* copyrighted films.

The motion picture industry now derives a very substantial share of its domestic income from television. Its ability to continue program production is in serious jeopardy unless it is compensated for the use of its films by CATV. Such use results in an increasing diversion of its business from the motion picture industry's paying customers—the TV stations—to the non-paying users of its films—the CATV operators. Accordingly, *Amici* are vitally concerned that this Court has before it a complete analysis and argument covering all phases of the public and private considerations involved in the issue presented to this Court.

The Court below has stated in its opinion:

> "The starting point in our analysis of appellants copyright-infringement claims must, of course, be the Supreme Court's decision in Fortnightly Corp v. United Artists Television, Inc., . . ."

One of the *Amici* herein was the plaintiff in the *Fortnightly* case. It is for that reason that *Amici* believe themselves to be in a unique position to present to this Court the factual and legal differences distinguishing the function of the cable systems in *Fortnightly*—which did not involve distant signals—from that in the case here on certiorari.

The consent of the attorneys for the respondents to the filing of a brief *amicus curiae* has been obtained. Counsel for petitioners have advised that while they do not consent to the filing of such a brief they would not oppose an application for leave to submit it.

WHEREFORE, *Amici* respectfully pray for leave to file the within brief in this matter.

Dated: New York, New York
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Respectfully submitted,

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This brief is submitted jointly by Motion Picture Association of America, Inc. (MPAA), Association of Motion Picture and Television Producers, Inc. (AMPTP), Columbia Pictures Industries, Inc., MCA, Inc., Metro-Goldwyn-Mayer Inc., Metromedia Producers Corporation, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation and Warner Bros. Inc.

Question Presented

The question decided by the Court below and to be decided in the instant proceeding is one of first impression. It is a test case of the issue as to whether a CATV system which imports a copyrighted program from a distant television market (where it is being telecast pursuant to a license by the copyright owner) and transmits said program to its monthly fee paying subscribers in another market, is engaged in a "performance" of such program and requires a license for each transmission from the copyright owner.

Interest of *Amici*

MPAA, AMPTP, and the aforelisted motion picture companies (*Amici*), represent a large percentage of the companies engaged in the production of copyrighted theatrical or television programs in the United States. These include films for theatrical release which are subsequently licensed to the networks and to individual stations, for non-network showing (referred to in the trade as "syndication"), films made specially for television, and series programs made for network television and subsequently licensed to individual stations in syndication.

All of these films are being imported by CATV systems into their own markets and distributed there to their monthly fee paying subscribers in competition with *Amici's* paying customers—the television stations in the same markets. The diversion of the viewing public from the motion picture industry's paying customers to nonpaying users of its films and the resulting decline of income from television licensing threaten the viability of the industry.

The plight of the motion picture industry and the drastic decline of its revenues and profits over the last few years are a matter of record. From 1969 to 1973, the major film distributors of this country, reported losses of $500 million. As *Variety* reported in its October 17, 1973 issue, Columbia Pictures Industries, Inc., suffered a total loss of some 82 million dollars in the past three years including a loss of some 50 million dollars within the past year only. According to the *Wall Street Journal* of December 5, 1973, p. 17, MGM had an operating loss of $585,000 in its last fiscal quarter 1972/73, has withdrawn from the movie-distribution business and has slashed its movie-production schedule drastically.

Obviously, if these financial difficulties are aggravated by the spread of CATV's free use of the producers' films, the result will be a drying-up of production. This would victimize the creative segment of the industry,[1] and would also deprive motion picture theatres, television stations, and CATV, of their primary need—high quality programs. Ultimately, the public will suffer.

The severity of these problems appears most dramatically in the figures showing the decline of motion picture theatre admissions since the end of World War II. Indeed, the revenues from such admissions declined from $1.692 billion

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[1] Unemployment among talents and craftsmen in Hollywood is severe. See the articles in *Time* magazine of August 23, 1971 and in *Variety* of July 22, 1973. See also the testimony of Chester Migden, Executive Secretary of the Screen Actors Guild, July 31, 1973, before the Federal Communications Commission, in Dkt. No. 19622, transcript p. 280. Mr. Migden stated that the unemployment rate in the Screen Actors Guild was approximately 85%; that unemployment in various craft unions ran from 10% to 75%; and that these figures did not really show the whole picture because many members of these unions (i.e., actors, writers, composers, and craftsmen), had abandoned their efforts to support their families by working in the industry.

in 1946 to $1.234 billion in 1972, a decrease of 27%.[2] When inflation is considered the $1.234 billion figure for 1972 is transformed into an even lower figure of $576.2 million in terms of constant 1946 dollars.

The same trend is revealed by the declining curve of the number of paid admissions to motion picture theatres as reported by the Motion Picture Association of America. In 1946, some 78.2 million persons entered a motion picture theatre each week. By 1972, weekly admissions were down to about 18 million persons, a decline of 77% in the face of a 48% increase in the U.S. population since 1946. This tremendous loss in theatre admissions has been offset only in part by revenues derived by the motion picture industry from licensing of its films to television.

The threat posed to the motion picture industry by the uncompensated carriage of its product by CATV must be evaluated in light of the explosive growth of the cable industry. According to the Television Factbook (Services Volume, 1973-74 Edition, p. 84a) CATV subscriber figures have grown from 2.8 million homes to 7.3 million homes between January 1, 1968 and January 1, 1973. The U.S. Department of Commerce projects an estimated 1.1 million additional CATV subscribers in 1973 and 1.3 million new subscribers in 1974 to reach a total of 9.5 million at the end of that year.[3] After a thorough survey conducted by the

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[2] The above figures were supplied by the U.S. Dept. of Commerce, Office of Business Economics and were published in the July issue of the Department's Survey of Current Business.

[3] U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of Economic Analysis (Survey of Current Business, National Income and Product Account of the U.S., 1929-65, 1973).

Sloan Commission, a prestigious group of scientists, lawyers, and educators assembled by the Alfred P. Sloan Foundation, that Commission concluded in its Report, *On the Cable* (McGraw-Hill, 1971) at pp. 173, 174:

> "The Commission believes that by the end of the decade a cable television system will be in existence which covers 40 to 60 percent of all American television homes; which provides in a majority of instances a capacity of twenty channels and in many instances a capacity of forty channels or more; which possesses a limited capacity for return signals from the home receiver back to the point of transmission; and which will be extensively interconnected, most probably by satellite."

These estimates have been confirmed by other studies.[4] *The Wall Street Journal* of January 12, 1972 reports a statement by the chairman of General Instruments Corporation, a major manufacturer of CATV equipment, estimating that $3.5 billion could be spent on cable system construction in the next decade; that those new systems could add 30 million subscribers to cable, out of a total of 62.1 million television homes, providing the industry, at a subscription rate of $5 per month, with new annual revenues of $1.8 billion.

These high revenues for CATV, produced by the diversion of audiences from TV to CATV, will reduce the income presently collected from advertisers by the many hundreds

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[4] According to an article in *Variety* of June 7, 1971, p. 30, a 460% rise in CATV homes by 1980 has been predicted by Frost & Sullivan, a New York market research company. A study made by this company estimates that CATV serviced homes will grow to 23,000,000 in eight years. And this study also says that CATV subscriptions alone, exclusive of advertising income and other special services, will bring in $2,000,000,000 in that year.

of stations to whom film producers now license their copyrighted works.[5] Given the present plight of the motion picture industry, the continued freedom from copyright liability, enjoyed by the cable industry, will erode the foundation of television program production in the United States.[6]

Summary of Argument

Affirmance of the decision of the court below is essential to preserve the structure of copyright on which television programming is based. At the same time, an adjudication that cable systems must pay license fees when they import programs from distant stations and transmit them to their monthly fee paying subscribers, will not imperil the cable industry. CATV systems are potentially important customers for the motion picture industry and the producers have a clear interest to preserve and encourage this new

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[5] When a comparable diversion of income occurred from theatres to television in the 1950's, it was at least accompanied by the payment of copyright fees by the television industry. By contrast the diversion from television to the cable industry with which the motion picture industry is now faced is without the payment of copyright fees by the cable industry.

[6] The diversion of audiences from TV to CATV and the resulting reduction of income striking the film industry affects not only the producers and distributors of copyrighted theatrical or television programs, but also the tens of thousands of persons throughout the industry who contribute to the creation of the motion pictures and whose rights depend on those which the copyright owners can enforce against CATV's commercial distribution of copyrighted films. The compensation of many of the creative talents such as the screen writers, directors, composers and actors, depends to a large extent, and in many cases the largest part, on their income from payments under collective bargaining agreements for showings of the film subsequent to its original telecast. To the extent that any such showing on a television station which would pay a license fee to the copyright owner is replaced by an importation of the same program by CATV, the talents of the creative segment of the industry will go unrewarded.

outlet for their product. Affirmance of the decision of the court below will contribute greatly to the adoption of a legislative solution of the CATV-copyright issue by breaking the legislative deadlock which resulted from this Court's decision in *Fortnightly*. (*United Artists Television, Inc.* v. *Fortnightly Corp.*, 392 U.S. 390 (1968).)

I

The "functional test" established by this Court in *Fortnightly* and followed by the Court below, requires consideration of the function that CATV plays in the total process of television broadcast and reception. The relevant factors include the economic realities of television broadcasting. It is the fact that when cable systems import programs from distant stations without paying the owners of the programs, they compete with local television stations which pay substantial license fees to the copyright owners for the right to transmit the very same programs in the same market.

License fees paid by television stations to copyright owners are dependent upon the revenue derived by stations from the advertising accompanying the programs. Advertising revenues in turn may be derived from local, regional or national advertising, and are dependent upon the size of the audience in the local market but not in distant markets. This is so because no regional or local advertiser is willing to pay a higher advertising rate when its commercials are carried by CATV to far-distant markets in which the advertiser's products are not distributed or sold.

When the copyright owner licenses his programs in syndication (i.e. for non-network exhibition) to local stations he is usually able to sell the larger markets first. If, however, CATV imports programs from the larger markets

to the smaller ones, the cable system scoops up part of the potential audience for these programs when exhibited by a local station. This diversion of audience and consequent loss of revenue is particularly severe when the importation of programs occurs prior to their exhibition by local stations.

The high financial risk and large capital expenditure which characterize motion picture production make the payment of CATV copyright fees of critical importance, especially because of the present perilous financial condition of the motion picture industry. The net economic effect of the importation of programs from distant stations without copyright licensing is that while the number of viewers of television programs by means of CATV grow, the reward to the program producers must shrink.

II

Contrary to petitioners' claim, copyright liability for the carriage of distant signals by cable systems is fully compatible with the Communications Act and the rules and policies of the FCC. Section 414 of the Communications Act makes clear that nothing in the Act is intended to amend, limit, or supersede the Constitutional or statutory copyright provisions. Thus the Commission explicitly recognized that "... our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction." *Second Report and Order*, 2 FCC 2d 725, 768 (1966). And throughout its Cable Television Report and Order, 36 FCC 2d 143 (1972), the FCC asserts that copyright policy is most appropriately left to Congress and the Courts and that its cable television rules are not to be considered a substitute therefor.

The policy of providing minimum cable service to certain areas of the country does not preclude or exclude a judicial finding that the transmissions involved are subject to copyright liability. The two matters are not mutually exclusive. In addition, by granting microwave licenses to cable systems for the importation of distant signals, the FCC neither relieves the system from the need to secure copyright licenses nor changes a Los Angeles signal into a "Local" signal in Farmington, N. M.

There is no merit to the claim that the FCC's exclusivity rules offer adequate protection to the copyright owners. These rules do not and cannot apply to license fees: they are not all inclusive and fall substantially short of the full and complete protection of the Copyright Act.

One unusual set of circumstances extracted from the decision of the court below involving the carriage of the Durango station by the Farmington CATV does not create an insoluble conflict under the FCC's rules. The FCC has made it abundantly clear that following a judicial finding of copyright liability, it would take action to insure that its carriage rules do not subject a cable system to liability for copyright infringement.

III

The decision below is in full accord with the primary purposes of the Copyright Act. A copyright owner does not get a "second reward" when a CATV system imports a program from a distant station, since the distant station will not pay for exposure of its broadcasts in markets not served by its advertisers. However, there would be nothing contrary to copyright policy if the separate commercial use by the importing CATV station would lead to a separate compensation to the copyright owner.

IV

The mechanics for licensing programs to CATV can be easily worked out directly between eager sellers and willing buyers or through clearing houses and central buying offices such as now exist in the distribution of copyrighted programs to television and radio stations. All the information required by CATV for program clearance is readily available from numerous sources, e.g., television broacast stations, newspapers, TV Guide etc. Indeed, many cable systems now employ program buyers to acquire copyright licenses when the system engages in program origination. With respect to CATV systems owned and controlled by smaller, individual entrepreneurs, *Amici* have agreed and have repeatedly reaffirmed their willingness to support copyright legislation which would grant a total exemption to such systems.

V

The viability of the cable industry is not threatened by liability for past damages or suits for injunctive relief. As a potential customer and licensee for the product of copyright owners, it would be self-defeating for the copyright owners to seek damages which would seriously affect CATV. In any event, this Court has the power to eliminate the issue of past liability from the case by applying its decision prospectively if justice should so require. *Chevron Oil* v. *Huson*, 404 U.S. 97, 106-07 (1971).

The equitable powers of this Court and the lower federal courts, as well as the enforcement powers of appropriate government agencies, fully protect CATV against future suits for injunctive relief.

VI

The failure of Congress to act on the cable-copyright question can be traced to the intransigence of the cable industry following this Court's decision in *Fortnightly*. Since *Fortnightly*, the cable industry has exhibited no real interest in supporting legislation which would subject it to copyright liability. In 1971, the cable, broadcasting and program production industries entered into a "Consensus Agreement" sponsored by the FCC and the Office of Telecommunications Policy providing for joint recommendations to the Congress regarding CATV-copyright legislation and payment of copyright fees. The CATV industry has repudiated said agreement following the decision of the District Court herein which would have exempted CATV's importation of distant signals from the copyright law. Legislative activity which was revived after the Court of Appeals had reversed the Decision of the District Court, now seems to be stalled again since the granting of certiorari.

Accordingly, a decision in favor of petitioners will probably destroy any opportunity for a legislative solution to the cable-copyright problem. Conversely, an affirmance of the court below will contribute greatly to the adoption of CATV-copyright legislation.

POINT I

The decision of the Court below is fully consistent with the economic realities of the television industry.

Petitioners pay mere lip service to the "functional test" established by this Court in *Fortnightly* and argue that the decision of the Court below disregards the economic realities. Petitioners are clearly in error. In *Fortnightly*, this Court referred to the "function that CATV plays in the total process of television broadcasting and reception" in determining whether CATV operates on "the viewer's side of the line," 392 U.S. at p. 397. *Amici* respectfully submit that the "functional test" established by this Court did not mean to exclude, but rather to emphasize, the social, industrial and economic realities of the television broadcasting scene as a whole.[7]

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[7] The television revenues of the copyright owners are principally derived from two sources: the licensing of (1) programs to national networks for distribution to their affiliated stations for simultaneous or (due to time differences) same-day broadcasting; and (2) programs to individual station use where the film or tape for that purpose is physically sent to the station for broadcasting (referred to in the trade as "syndication"). The importation of distant signals by CATV adversely affects both these sources of income without the countervailing benefits asserted by petitioners.

[8] *In re Network Television*, 25 FCC 2d 318, 330 (1970).

". . . 'independent' television producers of programs for *network* exhibition must deal with the networks or not at all; all [are] effectively excluded from non-network sales of their programs in prime time and rarely recoup their costs from the network run of the program, let alone make a profit. Normally, producers do not earn profits from the network run of the program, but must look to subsequent syndication of the series to make them whole and to provide a profit. In effect, network exhibition is to this extent subsidized by non-network use of the programs." (Footnotes omitted.)

In asserting that the Court below has disregarded the economic realities, petitioners have confined their argument exclusively to one of the two principal sources of copyright revenues, namely, network exhibitions and have disregarded and omitted any consideration of the revenues derived from syndication exhibitions. The importance of revenues from syndication to copyright owners has been recognized by the FCC,[8] and is stressed in the succeeding points.

1. ***Local, regional and national advertising revenues are dependent upon the size of the audience in the local market and not the distant market.***

In compliance with the policy of the Communications Act "to make available, so far as possible, to all of the people of the United States a rapid, efficient . . . radio communications service" (47 U.S.C. Sec. 151), the FCC, in order to avoid signal interferences between stations, allocated frequency channels to each of about 850 communities in the United States (47 C.F.R. Sec. 73.606) and assigned to each station a particular frequency, determined its power, and prescribed the height and location of its antenna (47 C.F.R., Sec. 73.614, 685, 689).

The frequency allocations and determinations by the FCC of a station's power, and of the height and location of its transmitting antenna, together with the electrophysical limitations imposed by the horizon,[9] lead to a limitation of the area which the station's signals reach for effective reception and to the creation of definite geo-

[9] The reception of television broadcasts is limited in distance due to the horizon with only slight extensions caused by the gravitational bending of electro-magnetic waves.

graphical areas and commercial "markets" serviced by local stations.

Copyright owners grant licenses to a television station for the telecasting of programs in that station's market. These licenses usually restrict stations to their present power and antenna height to prevent programs from being received in other markets. CATV exportation of these programs into other markets, in effect, deprives the copyright owners of their right to grant exclusive licenses in such other markets and thereby diminishes their ability to collect license fees in those markets.

A commercial broadcast station derives its revenue principally from advertisers who either sponsor programs or whose names and commercials are inserted as so-called "spots" during the breaks in the program, or at the time of change of programs. Such advertising carried on television may be of a national, regional or local nature. But no regional or local advertiser is willing to pay a higher advertising rate when its commercials are carried by CATV to far distant markets where the advertiser's products are not distributed or sold. Consequently, a television station is not willing to pay the program supplier a higher price for programs with local or regional commercials shown outside of the station's own market area. Similarly, national advertisers will place little, if any, value on duplicated coverage of their commercials by CATV when it imports the commercials and duplicates them with those carried by the local stations.

This experience of *Amici* in marketing their product is confirmed by the in-depth economic study of Dr. Leland L. Johnson for the Rand Corporation under a Ford Founda-

tion grant entitled *The Future of Cable Television* (1970). Dr. Johnson states his findings as follows (pp. 22, 23):

> "... a critical question relates to *how advertisers value distant audiences* relative to local ones when they buy time on a station.
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> In fact, there is reason to believe that advertisers, on the whole, do not value distant and local audiences equally at any instant of time. Although the distant audience frequently has some value to the advertiser buying time on a local station, it is probably less than the value for the local audience of the same station."

The reasons for such difference in valuation are explained by Dr. Johnson as follows:

> "In the first place, it is clearly true that strictly local advertisers, which today comprise about 20 percent of total television broadcasting time sales, place little if any value on distant audiences; the used car dealer who buys time from the Los Angeles station would have little interest in knowing that the station signal is also carried by a station in Albuquerque. Secondly, even regional and national advertisers do not view all audiences equally. Non-network national spot sales of broadcasting stations comprise nearly 50 percent of total broadcasting time sales, while network sales comprise roughly 30 percent. The national spot sales market operates to satisfy the desire of advertisers to pinpoint markets at particular times without paying the price of simultaneous exposure elsewhere. And in buying time from networks, advertisers are careful to select a particular lineup or subset of the network's affiliates. In both cases, the valuation an advertiser places on a particular market depends on a number of

> factors, including his coverage through other media, the character of the local population, and the extent to which he has sales outlets in those markets."

The Solicitor General in his brief submitted to this Court in *Fortnightly* (pp. 10, 11) took the same position with regard to the economics of the television marketplace. In urging that the transmission of programs into distant markets be subject to copyright protection, he stated:

> ". . . much of the advertising which accompanies the performance of copyrighted works, such as motion pictures, is directed solely at potential viewers who are within the station's normal service area—'local' advertising and 'national spot' advertising both fall within that category. Such advertisers do not necessarily derive any significant commercial benefit from CATV carriage of the sponsored programs outside of the market ordinarily served by the particular station, and accordingly may be unwilling to pay additional amounts for such expanded coverage."

Applying the foregoing economic realities to the CATV systems operated by petitioners in the instant case, it is obvious that a furniture dealer in Los Angeles, or a used car dealer in Spokane, will not pay a penny more to these stations for having its commercials carried by petitioners' cable systems to Farmington, New Mexico or Great Falls, Montana, respectively. Since such exportation cannot produce more income for the television station, the station whose programs are being exported to other markets will not pay increased license fees to the copyright owners for such additional use of the program.

2. *Unrestricted importation of distant signals will have an adverse impact on the license fees which copyright owners may obtain from local stations in the receiving market.*

A station's advertising rates generally reflect the size of its viewing audience, but for the reasons which we have shown, only that within the station's normal coverage area.[10] This revenue is wholly dependent upon the station's ability to broadcast programs which the home viewer will want to watch. To obtain that audience the station will pay substantial sums of money, which include copyright fees, for the production or purchase of attractive programs.

In order to maintain its audience and revenues, it is indispensable that the broadcast station have the exclusive right[11] for a reasonable period of time to show its programs in its market. Each time a program is exhibited in a market, the audience potential for the next showing of the program in that market is diminished. Therefore, the fee that stations are willing to pay for the right to show a copyrighted work usually diminishes with each successive showing in the particular market especially where the importation occurs shortly prior to the exhibition by the local station.

When the copyright owner licenses his programs in syndication, he usually is able to sell the larger markets first

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[10] Petitioners' contentions regarding advertising rates related to size and share of audiences are wholly irrelevant to the point discussed here because they fail to distinguish between local and distant audiences and the respective advertising values and non-values which should be allocated thereto.

[11] The principle of "exclusivity" has been described by the FCC as "an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment and programs." *First Report and Order* in Dkt. No. 14895 et al. ("First Report") 38 FCC 683 (1965), par. 57; Second Report and Order, 2 FCC 2d 725 (1966), par. 27.

since there is a greater demand for product in markets having several stations. If, however, CATV imports programs from the larger markets into smaller ones, before their exhibition by stations in the smaller markets, the cable system scoops up part of the potential audience for these programs to the detriment of the exhibition of these programs by the local station.

Advertisers want to insert their commercials into programs broadcast by the local station attracting the largest possible audience in the market which is the target area of their advertising. Where the potential audience for a program is diminished by CATV importation, the advertiser would be unwilling to sponsor the program, and the local station, if willing to buy it at all, would pay only a reduced price therefor. Consequently, the importation reduces the value of the program to the local station and it becomes very difficult, if not impossible, for the copyright owner to make a sale in that market. It is for this reason that when a copyright owner licenses a program to a Los Angeles station for the Los Angeles market, he neither desires nor permits the program to be carried into any other market, and would not grant special permission therefor without receiving an increased fee to compensate him for the loss of business certain to be incurred when the program is carried into that other market. Yet that increased fee is not obtainable because of the absence of economic value of distant markets to local and regional advertisers.

As the Solicitor General also pointed out in his brief to this Court in *Fortnightly*:

> "Transmission of a sponsored program into a distant market, where CATV penetration is substantial, may also significantly decrease the potential audience in

that market for the program and adversely affect the advertising revenues which a local station there could otherwise expect to obtain from program sponsors. Should this happen, the net result may be to diminish the value of a copyrighted work in the distant market without any corresponding increase in the copyright owner's royalties from the originating market" (pp. 10, 11).

In light of the foregoing, it is apparent that the failure to provide copyright protection for distant signals will adversely affect copyright owners by a loss of license fees in the receiving markets with no added fee from the transmitting markets.

3. ***The high financial risk and large capital expenditures which characterize the motion picture industry make the payment of CATV copyright fees of critical importance.***

The production and distribution of both feature films and television program series are characterized by a high degree of financial risk with large capital expenditure. Even where a motion picture is produced for initial exhibition in theatres, the loss in theatrical audiences means that the great majority of these films would not break even, let alone make a profit, without revenue from television showings. Indeed, the profitability of most feature films depends on the revenue from television.

Even more risky are the development, production and distribution of programs specifically designed for television. Producers of television series must initiate, with a substantial investment, a broad range of program development projects to insure a continuous flow of product. Fewer than one in five "development projects" (all of which require considerable cash risk) progress to the point of being a

finished "pilot" film. The pilot itself is merely a sample program requiring a significant speculative outlay by the producer, the return of which is by no means guaranteed. Approximately two-thirds of the pilot programs are not successful, and of such programs which are successful, 90 percent of the producers do not recoup their expenses in the first run.[12]

It is characteristic of the motion picture industry that seldom does a single source of income pay the entire cost of making a film. Thus, a significant part of the income from a film initially exhibited in theatres now comes from its later exhibition on television. Similarly, a major part of the income from a film or series program made for network television comes from later "syndication." It is the impairment of this latter source of income[13] which is most threatened by CATV importations.

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[12] Mr. Richard Jencks, an official of Columbia Broadcasting System, Inc., testified (Trial Tr. p. 15):

> "In the current season . . . we commissioned approximately 80 scripts to be written and on the basis of those scripts decided to produce approximately 18 pilot films, that is to say, films of projected network television series. Out of those 18 pilots, we ultimately chose five series which were scheduled for this season and which went on the air for the first time a week or ten days ago."

[13] Sales of MPAA members from non-network television distribution (syndication) amounted to $146 million. The FCC has stressed again and again that a healthy program production industry is essential in the public interest. Thus, in its Report adopting the Prime Time Access Rule, 23 FCC 2d 382 (1970), the Commission said (p. 386):

> A healthy syndication industry composed of independent producers capable of producing prime time quality programs must have an adequate base of television stations to use its product.

Similarly, in the even more recent Cable Television Report and Order adopted Feb. 2, 1972, 36 FCC 2d 143 par. 73 (1972), the

CATV interests, however, claim that copyright owners should seek to make up their losses by charging additional fees to their licensee television stations whose programs CATV systems retransmit to their own paying subscribers. Since these stations are also the victims of CATV's competition and diversion of income in their own markets, such claim adds insult to injury. Moreover, as we have shown, *supra*, pp. 17-23, the originating station will be unwilling to increase its fees because most advertisers will not pay higher rates for having their commercials carried to distant markets. As the Court below noted, "economics and common sense compel [this] conclusion," 476 F.2d 338, at xviii.

The net economic effect of permitting the importation of programs from distant stations without copyright licensing is that while the number of viewers of television programs by means of CATV grows, the reward to the creative artists must shrink as broadcasters become fewer, and their audiences smaller. The end result must be that less and less talent will be attracted to the creation of television programs, that the standard of quality of such programs will inevitably suffer, and that the number of programs in which it would appear fruitful to make an investment will decline.

Commission stressed the need "to insure the continued health of the television programming industry" and further expressed its concern "with the continued supply of television programming".

POINT II

Copyright liability for the carriage of distant signals by cable systems is fully compatible with the Communications Act and the rules and policies of the Federal Communications Commission.

Petitioners' Brief is interlaced with claims that the decision of the Court below conflicts with the Communications Act, 47 U.S.C. §151 et seq., and the rules and policies of the FCC adopted thereunder. Thus, petitioner asserts that the FCC has set forth certain criteria of minimum television service and that the public has an absolute right to such service. Another argument is that by granting microwave licenses for the retransmission of television signals from one market to another, the FCC has changed the character of the signals transmitted so that local signals in the originating market remain local signals in the distant market. Yet another argument is that the FCC rules requiring cable systems to carry certain stations, upon request, creates a mandatory requirement for the carriage of infringing distant signals.

We submit that these arguments are wholly without merit. Nothing in the Communications Act or the relevant decisions of the FCC provides any basis for the determination that copyright liability for distant signals would impede the regulatory goals and objectives of the FCC, generally, or specifically with respect to cable television. To the contrary, it is abundantly clear—and the FCC has explicitly recognized—that the absence of such liability would be inconsistent with, and would require a re-evaluation of, the regulatory scheme for cable television.

The issue in this case, however, is whether petitioners "perform" respondents' copyrighted works within the meaning of the Copyright Act. The rights of all copyright owners are squarely based on the language of the Copyright Act of 1909 which in turn rests upon an explicit constitutional provision, *United States Constitution*, Art. I, §8.

Nothing in the Communications Act amends, limits, modifies, supersedes, or makes exceptions to the constitutional or statutory copyright provisions. Indeed, Section 414 of the Communications Act, 47 U.S.C. §414, provides:

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

Both this Court and the lower federal courts have affirmed the policy embodied in Section 414 that the Communications Act is regulatory in nature and is not dispositive or determinative of private property rights.[14]

Turning to the rules and policies of the FCC, petitioners' arguments fare no better. At no point has the FCC ever stated or even intimated that the imposition of copyright liability for distant signals would conflict with its basic policies or its regulatory scheme for cable television. Rather, it has repeatedly asserted that its cable rules were

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[14] See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication"; *Cable Vision Inc.* v. *KUTV, Inc.*, 335 F.2d 348, 349 (9th Cir. 1964) *cert. denied*, 379 U.S. 989 (1965) ". . . Congress had not pre-empted the adjustment of property rights in the communications field by passage of the Communications Act of 1934."

designed to foster and facilitate a settlement of the cable-copyright question, *Cable Television Report and Order*, 36 FCC 2d 143, 166-67, para. 65 (1972).

In his concurring statement to the *Cable Television Report*, Dean Burch, Chairman of the FCC, elaborated on the Commission's copyright approach (36 FCC 2d at 290):

> ". . . one of the gut issues of the cable controversy [is] that cable remains an uneasy outsider with respect to the programming market. And only when it is brought within that market, when its right to the use of its basic product is secure and regularized, only then will its future be unclouded. It is this issue that the Federal Communications Commission can neither resolve nor avoid."

In its *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972), the Commission was confronted with arguments that it should delay the effectiveness of its new cable rules until a resolution of the copyright issue. The Commission rejected these arguments (36 FCC 2d at 328, para. 5):

> "Over the years, the ultimate integration of cable television into the nation's communications structure has been deadlocked on the copyright question—how to weave the cable industry into the market for distributing television programs, a process that distributes the costs of programming among those who use it. The tying of cable's development to the settlement of copyright has in the past served to harden the impasse, not unblock it. We now expect agreement of the industries and that legislation will be forthcoming. We are convinced that putting our program into effect only after legislation is enacted will effectively diminish the prospect for settlement and

will not promote our goal of fostering the orderly development of cable television." [15]

The clear and overwhelming evidence, therefore, is that the FCC rules and policies with respect to cable television were enacted in expectation that copyright protection would be recognized under the 1909 Act or in a revision of that Act. Indeed, the regulatory scheme was designed to foster and encourage a legislative or judicial resolution of the cable-copyright issue.[16] Thus, the FCC rules or policies with respect to cable television are fully consistent with the decision of the court below.

There is, therefore, no merit to petitioners' argument that the imposition of copyright liability somehow conflicts with the minimum service criteria established by the FCC. The Commission has enunciated a policy under which it hopes to provide cable viewers a minimum number and choice of signals. At the same time it has recognized that the question of copyright liability for programs contained in those signals is a matter for Congress and the Courts.

The absence of any inconsistency can be illustrated by reference to other regulatory objectives of the FCC. One of the fundamental policies of the FCC pursuant to the

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[15] The reasons why legislation has not been forthcoming in the two years since the FCC rules were adopted—and why none is predicted until at least 1975 (*Broadcasting*, December 3, 1973, p. 7)—are detailed elsewhere in this Brief, pp. 55-60.

[16] In a *Letter of Intent (Cable Television Proposals)*, 31 FCC 2d 115, 116 (1971) submitted to Congress outlining the Commission's proposals for the cable industry, Chairman Burch made clear that "copyright policy is most appropriately left to the Congress and the courts." The Commission has consistently adhered to this view:

"We have stated that our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction." *Second Report and Order*, 2 FCC 2d 725, 768 (1966).

specific Congressional mandate is to maximize television service *through* the extensive use of local stations.[17] In this regard both Congress and the FCC are on record as favoring the development of UHF stations.[18] Although the FCC desires to foster full utilization of the UHF portion of the broadcast spectrum, all UHF stations do pay copyright fees. It has never been suggested that the encouragement of UHF stations should occur at the expense of copyright owners, or that the payment of copyright fees by UHF stations somehow conflicts with the FCC's policies to favor the development and growth of minimum UHF service. Accordingly, there is no merit to the claim of any conflict between the Commission's goal of minimum service by cable systems and the decision of the Court below.

Another argument advanced by petitioners is that the FCC, by its power to prescribe the area or zones to be served by stations, 47 U.S.C. §303(h), may convert distant signals into local signals through the grant of microwave licenses (Pet. Br. pp. 50 to 56). This argument is nothing but semantic doubletalk.

First, the fact that the FCC has issued a "license" to a microwave carrier permitting it to bring distant signals to CATV is, of course, no more equivalent to the granting of a copyright license to the CATV than it would be to a broadcast station when the FCC issues a license authorizing it to operate under the provisions of the Communications Act. In neither of these cases, can the license under the Communications Act and regulations promulgated by

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[17] See the FCC's *Sixth Report and Order*, 17 Fed. Reg. 3905 (1952).

[18] See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 174 (1968).

the FCC take the place of program licenses from the copyright owners. These "licenses" are required by different statutes, are issued for different purposes, and provide different authorizations. And the authority to grant such rights and privileges is vested in different agencies and entities. Their common designation as "licenses" should not be permitted to obscure the issues before this Court.

Second, when a cable system in one television market (*e.g.*, Washington, D.C.) imports television signals from another television market (*e.g.*, New York), the signals are local in the originating market and distant in the receiving market. This distinction between local and distant signals permeates the FCC's *Cable Television Report, supra,* and the FCC's rules are dependent on it.

To urge that the signals imported from the distant market are somehow converted to local signals in the CATV market by virtue of the microwave transmission would lead to absurd results. For example, all television stations must file an application for renewal of their licenses every three years, 47 U.S.C. §§307(d), 308. In this application form, the FCC requires each station to show how it has met the needs and interests of the area served by its license and how it proposes to meet those needs during the next license period. If, in the case cited, the New York signals were transformed into "local" signals by their importation into the Washington market, then Washington would become part of the New York service area in terms of the licensee's responsibility to operate in the public interest. In short, the separate identity of the New York and Washington markets would be destroyed.

Moreover, by abandoning the distant signal–local signal dichotomy, petitioners would create a system of regional

"super stations." Thus a small number of large "super stations" located in such major markets as New York, Chicago and Los Angeles would replace local stations supported by local advertising and would blanket the nation with a uniform program fare sponsored by national advertisers. The creation of such "super stations" would subvert the FCC's commitment to preserve local broadcasting. As the Commission said in the *Cable Television Report and Order*, 36 FCC 2d 143, at 164, para. 58, "our basic objective is to get cable moving so that the public may receive its benefits, and to do so *without jeopardizing the basic structure of over-the-air television.*" (Emphasis supplied.)

Further, in the FCC's *First Report and Order on Microwave Relays*, 38 FCC 683, 700, para. 47 (1965), the Commission expressly rejected the concept of a few "super stations," the signals of which would be spread all over the country by a nationwide network of relay systems:

> "Thus, our commercial television system is based upon the distribution of programs to the public through a *multiplicity of local station outlets.* In seeking to lift restrictions upon the growth of multiple services imposed by the UHF-VHF problem, *we have not turned to an alternative system of signal and program distribution, based upon a handful of 'super stations' and a nationwide network of wires, microwave relays and translators.* Our fundamental program in this area stems from the all-channel receiver legislation, enacted in 1962 (76 Stat. 150, 151). And that legislation, recognizing the *importance of local outlets and local service,* seeks an expansion of the present system through the creation of new station outlets in the UHF bands." (Emphasis supplied.)

Clearly, a changeover to a policy of national or regional "super stations" would be squarely contrary to the most

fundamental principles of communication policy as expressed by the Congress and implemented by the FCC.[19]

Petitioners also argue that under the exclusivity rules adopted by the FCC, in its *Cable Television Report, supra* 47 C.F.R. Part 76, Subpart F, 36 FCC 2d 143, at 233-36, distant signal reception by cable systems is limited and the interests of the copyright owners are adequately protected (Pet. Br. pp. 55-56). The short and dispositive answer to this argument is that the exclusivity rules do not and cannot apply to license fees. As Chairman Burch stated in his concurring statement to the *Cable Television Report:* " . . . . we have no power to legislate copyright payments," 36 FCC 2d at 290.

Further the FCC's exclusivity rules are not all-inclusive. They prohibit only selected types of programs from being shown in certain markets for limited periods of time, 47 C.F.R. §76.151(b). Moreover, the exclusivity rules are

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[19] The normal service area and commercial market of a television station can be extended lawfully through the use of "repeater" (translator or booster) stations which require a license by the FCC (47 C.F.R. §§73.689, 74.731-32, 74.831-32). As of March, 1973, there were 2,781 licenses for translator stations outstanding (*TV Factbook*, 1973-74 Ed., Services Volume, p. 250a). The repeater, like any other station, requires a license under copyright law for the rebroadcast of a copyrighted program although its signals can be received by anyone in the area and does not have subscribers who pay for its service. Thus, in spite of the fact that repeater stations do not collect fees from their audience, they pay copyright fees.

Should petitioners' CATV systems be permitted to import programs from distant stations without the consent of their copyright owners, repeaters may well claim that such holding should be extended to them. Thereafter, it would be only a small step further to a claim that all television stations, when rebroadcasting another station's programs, are exempt from the copyright law. Such a claim, if accepted as a logical extension of petitioners' position, would mean the end of copyright protection in the television field.

clearly predicated, with only one limited exception,[20] upon the sale of the particular copyrighted program in the market to a television station. Absent such a sale no exclusivity bar exists against the importation by CATV of a signal from another market. Thus, the absence of such a bar precludes or adversely affects future sales of copyrighted programs to the markets into which programs are imported. Under these circumstances, it is patently false to assert that the FCC's exclusivity rules offer copyright owners an adequate substitute for the full and complete protection of the Copyright Act. The copyright owners are not compensated by CATV for the use of product and yet CATV can destroy the income from the markets where the copyright owners are deprived of exclusivity protection.

Finally, petitioners devote substantial space to an asserted conflict between the FCC's carriage rules and one unusual set of circumstances extracted from the decision of the Court below (Pet. Br. pp. 72-73). The Commission's carriage rules provide that all cable systems operating in a community located wholly outside all major and smaller television markets must carry, upon request, the signals of any television broadcast station if the community of the cable system is within the Grade B contour of the station, 47 C.F.R. §76.57(a)(1). Thus, in the situation where such signals would be classified as "distant" rather than "local" under the decision of the Court below, petitioners urge that the carriage requirement makes the cable system liable for copyright infringement. To prove the point they cite

[20] 47 C.F.R. §76.151(a) provides that in markets 1-50 there is a preclearance period of one year from the date a program is first licensed as a syndicated program to a television station in the United States.

the example in the record of the carriage by the Farmington system of the Durango signal.

The example cited by petitioners is an unusual one. The Grade B contour of a television station is defined by the Commission as the line which defines the area at the perimeter of which a good picture can be expected 90 per cent of the time at 50 per cent of the locations.[21] Thus, in the normal course most Grade B signals would be capable of reception by traditional roof-top antennas and would clearly be "local" signals under the decision of the Court below. In Farmington, however, the signals are not available because they are blocked by high intervening mountains.

The problem posed by the Farmington-Durango situation, while unusual, is not new to the FCC. The FCC had a similar carriage requirement when the *Fortnightly* case was pending before the courts. Following the decision of the District Court in *Fortnightly*,[22] the problem was even more acute since copyright liability had been found for the retransmission of all signals, local as well as distant. Nevertheless, in reaffirming and extending the applicability of its carriage rules, the Commission stated:

> "Finally, we shall make brief mention of the copyright matter because, despite our plain statements in paragraph 159 of the first report, there would still appear to be some confusion on the part of some persons as to the effect of our carriage and nonduplication rules upon the pending copyright disputes. We have stated that our decision is not intended to affect in any way the pending copyright suits, involving as they

[21] *Sixth Report and Order*, 17 Fed. Reg. 3905, 3915; see 47 C.F.R. §73.683; see also *Clarksburg Publishing Co.* v. *FCC*, 225 F.2d 511, 515-516 (C.A.D.C. 1955).

[22] 225 F. Supp. 177 (S.D.N.Y. 1966).

do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. Thus, the fact that we have given the local station the right to have its signal carried over the CATV system (and not duplicated for a reasonable period), affords no defense to that system in a copyright suit. The station cannot bestow broadcast or transmission rights to programming which it does not own (or as to which it has not obtained a license to do so). * * * In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the first report, have to revise our rules. We have acted now, in light of the present copyright situation, which would appear likely to obtain for some substantial period of time, and without the slightest intent of affecting the determinations to be made in the pending suits.[23]" (Footnote omitted.)

Further, in its *Memorandum Opinion and Order* issued thereafter, 6 FCC 2d 309, 314 (1967) the Commission specifically rejected the argument that the decision of the District Court in *Fortnightly* created an immediate conflict with its carriage rules:

". . . our rules are based on the present situation in which the CATV system operates without regard to copyright clearance. We again state that our actions should not be taken as in any way affecting the copyright suit. As to the above argument, the short answer is that it is up to the system to determine whether to follow the district court's decision or the present industry practice, but it cannot properly obtain a waiver of our carriage rules when it follows a selective policy in this respect (i.e., ignoring copyright in the case of distant signals and purporting to follow it as

[23] *Second Report and Order*, 2 FCC 2d 725, 768-69 (1966).

to local signals). We believe that in light of present industry practice, no revision of our rules is needed, and that we should, therefore, deal with any situations of this sort by waiver, when and if they arise. Generally, any revisions of our rules in this respect must await further developments."

From the foregoing it is clear that the FCC has always viewed its carriage requirements as subordinate and subject to copyright policy and any decision which might be made with respect thereto by the Congress or the Courts. The FCC has also indicated its readiness and ability to deal with such problems as might arise in the future if a conflict with its rules developed. Given the limited number of situations in which a potential carriage-copyright conflict might arise, we believe that the FCC is fully capable of resolving such conflicts in a manner consistent with the public interest.

POINT III

The decision below is in full accord with the primary purposes of the Copyright Act.

Petitioners conceive the "primary policy" of the Copyright Act to be the release to the public of the author's creative genius (Pet. Br. pp. 68-69, 73-78). Petitioners further argue that when a copyright owner licenses a broadcasting station to transmit the copyrighted work, he has received a reward agreeable to him, has released the work embodied in the broadcast to the public, granted some kind of an implied license to cable systems to retransmit it, and may not collect a "second reward" for such retransmissions. Each of these arguments is fallacious.

1. *CATV sells its product to the public for profit and cannot justify its infringements by claiming to be "The Public."*

On the shaky foundation of their misinterpretation of the policy underlying the Copyright Act as favoring access of the public to copyrighted works over reward to the author, petitioners, posing as "the public", posit the further claim of a license to be implied in law (Pet. Br. pp. 68, 73). Petitioners do not explain how an implied license to the public, even if it existed, is, or can be, a license to *them,* unless we are willing to further posit an implied sublicense from the public to a private entrepreneur in order that the latter may *charge the public* and make a profit from the public's license.

The basic fault of petitioners' reasoning is that it wraps itself in the mantle of "the public" to cover up the true nature of its operations. Moreover, when the Copyright

Act, the Communications Act, or the cases decided thereunder refer to "the public" they mean, in the context of broadcasting, home *receivers* not commercial entrepreneurs utilizing sophisticated *transmitters* or *retransmitters* to sell copyrighted works to the public for a profit. Petitioners' error is caused by its erroneous self-identification with "the public" and the faulty image of itself as a "receiver" when in fact it imports and retransmits programs not otherwise available to its paying subscribers. Once we accept this functional reality, the premise of petitioners being "the public" falls by its own weight.

2. *Payment of separate license fees for separate commercial uses of a copyrighted work is fully consistent with copyright policy and will stimulate the production of high quality television programs.*

A copyright owner does not get a "second reward" when a CATV system imports a program from a distant station, since the distant station in the absence of advertiser support will not pay for exposure of its broadcasts in markets not served by its advertisers. In addition, there would be nothing inherently contrary to copyright policy if the separate commercial use by the importing CATV station would lead to a separate compensation to the copyright owner.

Multiple uses of copyrighted works have traditionally led to the payment of separate royalties for each profit-making use. Thus, as Dr. Leland Johnson explains in *The Future of Cable Television, supra* (p. 27):

> "... the fact that a movie is produced primarily for the theatre market and supported by paid admissions does not suggest that television stations supported by advertising revenues should have free access to those movies. Nor does the production of programming primarily for the advertiser-supported broadcast market

suggest that cable systems supported by subscribers should have free access to that programming."

The history of the motion picture industry illustrates this point well. The sources of the industry's income have varied over the years. In pre-television days, motion picture income came primarily from exhibition in theatres. When television became a commercial fact, the feature films produced by the motion picture companies and already shown in theatres were licensed under copyright law to television stations and networks for broadcasting into the nation's homes and additional fees were paid for the separate broadcasting use. Fees for television network use did not include the right to use the films for non-network broadcasting. The subsequent showing of films on local stations provided an additional source of income for the program producers.

These historical patterns of different rentals for different uses still prevail today.[24] The multiple sources of income from different uses of the same film provides money to pay the creative people who make the films.[25]

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[24] New contemporary uses include use of motion pictures in airplanes and on TV cassettes. Unlike CATV, neither the air transport industry nor cassette manufacturers have denied their liability under copyright law notwithstanding the novelty of the devices used for the exploitation of copyrighted programs.

[25] There is nothing unusual about motion picture distribution in this respect. Books, both fiction and non-fiction, are published in hardcover and softcover editions. Surely, the softcover edition requires a copyright license regardless of the fact that the author has already received a "reward" from the publisher of the hardcover edition. Surely the seller of the softcover edition cannot claim that he does not owe royalties to the author because the "public" to whom the softcover book is to be sold has a "license implied in law" to buy the book as the result of the prior sale of the hardcover book to other members of the public.

Moreover, the addition of a new source of income will be an incentive to increase and improve the production of programs. Dr. Johnson, in reasoning that CATV when it imports distant signals as a matter of copyright law should be treated in the same manner as television stations,[26] concludes that:

> "Even if advertiser erosion were not an issue, payment would constitute an additional revenue source to program producers that would likely stimulate production of additional programming *in a socially desirable fashion.*" (Emphasis supplied)

POINT IV

The clearance of copyrights for CATV can be worked out on the basis of precedents existing in the television program distribution market.

Petitioners claim that they should not be subject to copyright liability because "even if copyright proprietors were willing to grant licenses to CATV, there is no mechanism by which the CATV operators could effectively negotiate with the numerous copyright proprietors for copyright licenses" (Pet. Br. p. 38). National Cable Television Association (NCTA) adds in its *amicus* brief that "there is no device or way for the CATV system to locate the copyright owner, and certainly no way to compel him to negotiate once located" (NCTA Br. p. 14). In support of this argument petitioners and NCTA assert that many systems are small in size and operate in scattered locations (NCTA Br. p. 13).

We submit that the asserted administrative difficulties and obstacles conjured up by petitioners and NCTA are without substance. The CATV industry is now largely

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[26] *The Future of Cable Television, supra,* p. 28.

owned and operated by powerful corporate interests with diversified holdings in numerous industries including broadcasting and publishing. To the extent that CATV systems are owned and controlled by small, individual entrepreneurs, *Amici* have agreed and reaffirm their willingness to support copyright legislation which grants a total exemption to all such systems with less than 3,500 subscribers. Further, experience in related and other industries clearly establishes that a willing and bona fide buyer can readily obtain licenses from an eager seller. Thus, the asserted obstacles in the path of obtaining copyright licenses are either non-existent or easily overcome.

1. ***The mechanics of program licensing could be easily worked out between an eager seller and willing buyer through the creation of clearing houses and through central buying offices for CATV.***

Copyright owners are in the business of granting licenses for their copyrights and are equipped to do so. They have regional sales offices and maintain nationwide efficient sales organizations with eager salesmen to service their paying customers in the broadcasting and theatrical exhibition fields. The same program salesmen would be only too happy to license programs to the CATV industry. The only reason they have not done so is that CATV systems take the legal position that they are not obligated to obtain licenses.

Many radio and television stations are located outside of the large metropolitan cities. These small stations obtain licenses for their programs through central buying offices or have entrusted station representatives with the negotiations for purchases of programs. Such stations enter into licensing agreements for either individual pro-

grams or groups of programs, and have developed over the years, an efficient standard operating procedure for the licensing of copyrighted television programs throughout the United States. A majority of the CATV systems are located in the very same markets in which these small stations are located. Nevertheless these CATV systems assert that it would be too burdensome for them to secure licenses for these programs.[27] There is, however, no reason to assume that similar procedures cannot either be worked out by the play of free economic forces in the market or why the CATV industry could not work out such program licensing in negotiation with copyright owners.

A great number of musical compositions are played every day on radio and television, in hotels, night clubs, dance halls, etc. Yet, these users of copyrighted works have never been permitted to plead, as cable operators do now, that it is administratively too burdensome for them to find out in advance what these musical compositions are and who holds the copyright in them. These users found it convenient to acquire licenses for these works by means of omnibus or bulk licenses. No reason has been advanced why the same mechanism cannot be adopted for cable television clearances.[28]

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[27] While there were 2991 CATV systems operating as of January 1, 1973, there were 927 television stations and 2936 radio stations on the air as of the same date. (TV Factbook, 1973/74 Services Volume pp. 75a-84a)

[28] Music performing societies, organized by thousands of authors and composers, such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), clear literally hundreds of thousands of copyrighted programs with broadcasting stations and other commercial users. By the use of omnibus licenses or separate individual licenses and automated equipment, clearances between copyright owners and program buyers of the broadcasting stations have become a matter of routine.

Many cable systems employ buyers to acquire licenses when the system engages in program origination. In these instances, cable operators pay copyright fees. Unlike the retransmission of distant broadcast signals which the CATV operator takes from the air, origination requires possession of a print or tape of the program which is under the physical control of the copyright owner. For that reason, cable systems, including small ones, maintain program buyers. Indeed, petitioners' system in Farmington, New Mexico, negotiated for and did obtain licenses for films of the *Amici*.

CATV systems are neither economically too weak nor geographically too scattered, nor too uninformed in communications matters to clear the copyrights they need.

In the early pioneering days, CATV subscribers were serviced by CATV systems which were small or located in remote areas or both. However, the CATV scene has changed radically. Present industry statistics show that of the 3,032 CATV stations operating as of June, 1973, 1,048 or 34.6% are owned by broadcasters, 320 or 10.6% by manufacturing concerns, 308 or 10.2% by newspapers, 221 or 7.3% by publishers, 130 or 4.3% by theatre chains, and 50 or 1.6% by telephone companies, leading to an aggregate total of 2,076 or 68.6% owned by such corporate interests.[29] Among the owners of CATV systems are such large and knowledgeable firms as General Electric, Westinghouse, General Tire & Rubber Co., Time-Life, Times Mirror Co., Hughes Aircraft Co., and many other blue chip names.[30]

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[29] TV Factbook; 1973/74, Service Volume, p. 84a. Since the above listed outside corporate interests control much of the giant CATV systems in the big cities, the percentage of subscribers serviced by systems owned or controlled by outsiders is considerably larger than the 68.6% of system so owned and controlled.

[30] *Ibid.*, at pp. 737a-764a.

Moreover, among the remaining CATV systems which are not owned by outside interests, many systems, whether large or small, are no longer independently owned but as the result of a recent wave of mergers, have become members of large and powerful CATV group chains referred to in the industry as "MSOs" (Multi System Ownerships).[31] The U.S. Department of Commerce observed in its aforecited[32] study (p. 288):

> "The trend toward mergers and acquisitions in the cable industry continues. The largest multiple system in 1973 served about 800,000 subscribers. Much thought is being given to network interconnection of cable systems, and the possible use of domestic satellite channels for that purpose."

Thus powerful corporate interests which own CATV stations and which furnish its knowledgeable management will certainly be able to secure the necessary information and to obtain licenses from the copyright owners.[33]

Such information is readily available directly from broadcast stations, from TV Guide or from newspapers

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[31] For example, petitioner Teleprompter Corporation, which owns or has an interest in 142 systems and which as reported in CATV Newsweekly of November 19, 1973, p. 4, has now reached a 900,000 subscriber level, *equal to more than 11% of all CATV subscribers in the United States.* TV Factbook; 1973/74, Service Volume, pp. 737a-764a entitled Group Ownership of CATV Systems in the United States.

[32] *Supra,* p. 8 fn. 3.

[33] As respects even the small CATV systems many are owned by one of the multiple system owners and are managed and supervised by a well-trained "home office staff." Many members of this staff, whether at headquarters or in the local office, are former executives or employees of broadcast stations, well versed in all aspects of communications including licensing programs.

which list the programs carried by the stations they choose to transmit.[34]

As to the truly small systems in remote locations, they have become the rare exception rather than the rule and their existence should not be a pretext for exempting an entire industry from paying fees for the commercial use of copyrighted works. In any event, with respect to the small systems, independently owned and controlled, the *Amici* have agreed to support copyright legislation which grants a total exemption for such systems with less than 3,500 subscribers.[35]

There is no basis to NCTA's charge that the existence of an unmanageably large number of copyright owners with whom the CATV owners would have to deal would make copyright clearances extremely burdensome for cable operators. Dr. Leland Johnson in his study for the Rand Corporation found that there is only a relatively small number of distributors of copyrighted programs and suggests various ways how the licensing of these programs could be accomplished:[36]

> "Ironically, the very fact that distribution is in so few hands would simplify the clearance process as each distributor could negotiate simultaneously for all of the programming he handles with each expected buyer. Even today's product is frequently sold to

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[34] In those rare instances where a CATV system is unable to clear a copyright for a particular program it may substitute (manually or automatically) a program for which it has obtained clearance. Such substitution may be accomplished either by an "off-the-air-pick-up" or by utilizing existing microwave connections.

[35] As is shown below in detail, this agreement was repudiated by the CATV industry (see *infra*, pp. 56-58).

[36] *The Future of Cable Television, supra*, p. 37.

broadcasters not on a program-by-program basis, but on a package basis by each distributor. On the buying side, those cable owners having an interest in a number of systems could negotiate simultaneously for all of them. Or agents could handle simultaneously the request of many scattered systems in much the same way that agents today handle clearances for movie theatres. One attractive possibility would involve handling clearance somewhat along the lines that BMI and ASCAP follow in clearing music" (p. 37).

2. ***Since CATV will be an important customer of the copyright owners, they will not demand excessive fees or enter into unreasonable exclusivity agreements with broadcasters. Any abuse could be handled by appropriate government action.***

Cable systems are potentially important customers for the motion picture industry, so that any suspicion that the program distributors would go out of their way to injure CATV is absurd.

When the charge of an excessive number of copyright owners with whom CATV would have to deal, has been refuted, CATV operators fall back on an even less realistic defense against their paying of copyright fees. They assert that the program production industry is so concentrated that CATV would be at the mercy of their licensors' possible abuses, such as demand of exorbitant license fees or the erection of impregnable exclusivity barriers (NCTA Br., 12, 15).

The baselessness of that charge has been amply refuted:

"Serious objections to such payment [for distant signals] are frequently raised on grounds that cable operators would be forced to pay *exorbitant fees*. This concern is based partially on the fact that program

> production and distribution are concentrated in few hands, combined with the fear that the long-term exclusivity agreements for use of particular programs, typically made between producers and powerful broadcasting stations, would tend to shut cable operators out of the market for the most attractive programming. However, if the problem of unreasonable restricted access is serious (this study develops no evidence one way or the other), it is serious for *other* means of obtaining programming as well—both by cable operators for their own originations and by the less powerful broadcasters (especially UHF). In this case, the appropriate solution would appear to be either antitrust action on the part of the Department of Justice, or legal limitations on periods of program exclusivity—not the singling out of distant signals for special concessionary treatment." [37]

Dr. Johnson points to the absurdity of singling out distant signals for separate copyright treatment because of a possibility of abuse:

> It would seem not an appropriate response to single out *distant* signals carried by cable for special copyright treatment. To do so would be analogous to permitting purchase of certain kinds of automobiles (let us say station wagons) at specially low prices on grounds that manufacture of automobiles in the United States is dominated by only three corporations." (p. 36)[38]

In short, the alleged difficulty of CATV systems to buy program licenses is a myth, a disability which is easily cured by a modicum of effort and a willingness to accept the realities of modern business methods.

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[37] *The Future of Cable Television*, Summary pp. VI, VII.

[38] *The Future of Cable Television*, pp. 36, 37.

POINT V

The viability of the cable industry is not threatened by liability for past damages or suits for injunctive relief.

Petitioners urge that the ruling of the Court below poses a threat to the existence of the cable industry in the form of huge damage awards for past infringements (Pet. Br. pp. 67-68; NCTA Br. pp. 13-14). They base their claim on the damage provisions of the Copyright Act, 17 U.S.C. §101 and by multiplying the dollar figures set forth in the statute with the number of their infringements, reach multi-million dollar damages. Compensation in such large amounts, they assert, would threaten to place control over a major segment of the CATV industry in the hands of the copyright owners.

The concern expressed by petitioners is more theoretical than real since the Courts, in appropriate cases, may adopt a reasonable rule of damages or refuse to apply their ruling retroactively if justice should so require. Further, as to the possible ability of copyright owners to "take over" the cable industry, either by exacting exorbitant license fees or by unreasonably enjoining cable retransmission, we submit that the federal courts and other government agencies are amply armed with the means of preventing such prohibitive or punitive acts.

The history of the cable industry and its relations with the copyright owners make clear that the copyright owners have refrained from the institution of infringement actions that might saddle the cable industry with large damage awards. Indeed, only two suits for copyright infringement

have been filed: *Fortnightly* and the present case. This abstention on the part of *Amici* and other potential copyright plaintiffs is reflected in the assurances given by the *Amici* to the Chairman of the Senate Committee in the Fall of 1967 (following the decision of the court below in *Fortnightly*) that they would refrain from instituting legal action while negotiations for settlement or for legislation were in progress.[39] While such negotiations are no longer in progress,[40] it is significant that in the more than six years that have elapsed since those assurances were given, no new infringement suits have been filed.[41]

Underlying this consistent refusal to press for monetary damages is the economic reality that CATV is a potential customer for the products produced by *Amici*. These economic realities are such that it would be contrary to the self-interest of the *Amici* to seek damages which would seriously affect the CATV industry for its retransmission of copyrighted programs in the past.

Assuming, however, that even the bare possibility of past liability somehow poses an issue of decisional significance, we submit that this Court has the power to eliminate the

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[39] 113 Cong. Rec. S. 14067 (daily ed. October 3, 1967).

[40] See *infra* p. 58.

[41] The same moderation of the copyright owners will certainly apply to law suits regarding the determination of which signals are "local" and which ones are "distant" under the guidelines of the Court below. Law suits are just as expensive and time consuming for a potential plaintiff as they are for a potential defendant. Moreover the guidelines of the Court below are clear and easily applied by anyone familiar with the facts of a particular CATV system and its operation. The only reason why the matter could not be fully resolved by the court below and had to be remanded was that the District Court herein did not explore these facts on the ground that "distance" was not relevant to the function of petitioners' CATV systems.

issue of past liability completely from this case by applying its decision prospectively. *Great Northern R. Co.* v. *Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932). More recently, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), this Court outlined the considerations that determine whether it will refuse to apply a decision retroactively:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., Hanover Shoe v. United Shoe Machinery Corp., supra, at 496, 20 L Ed 2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., Allen v. State Board of Elections, supra, at 572, 32 L Ed 2d at 20. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Linkletter v. Walker, supra, at 629, 14 L Ed 2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'" *Cipriano* v. *City of Houma, supra,* at 706, 23 L. Ed. 2d at 652.

Applying these criteria to the present case, this Court could require the nonretroactive application of a decision if it should determine that justice so demands.

In any event, it should be emphasized that the issue of damages was not included in the first stage of the trial[42] which is the only one under review before this Court.

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[42] Pre-trial Order Number One, A. 71a.

It is the subject of the remand order issued by the Court below. If, following a trial on the damage question, petitioners are dissatisfied with the result, their rights of appeal guarantee that the issue will be presented based upon a full and complete record.[43]

The fear is also expressed that even if liability for past damages can be gainsaid, the CATV industry will be at the mercy of the copyright owners in the future by suits for injunctive relief. The notion that the cable industry will be subject to a conspiracy and take-over by the program industry as a result of the decision by the Court below is without substance. The proper agency to prevent such conspiracy and illegal take-overs is the Department of Justice which in the past has not hesitated to enforce the anti-trust laws with the necessary vigor.

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[43] The mandatory application of the statutory minimum of $250 per infringement in all cases is by no means settled. Compare *Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228 (1952) with *Shapiro Bernstein & Co.* v. *4646 S. Vermont Ave. Inc.*, 367 F.2d 236 (9th Cir. 1966); *Ziegelheim* v. *Flohr*, 119 F. Supp. 324 (E.D.N.Y. 1954); see Nimmer, *Copyright* §§154.1-154.14 (1973). *Cf. Davis* v. *E. I. Du Pont de Nemours & Company*, 249 F. Supp. 329, 340-343 (S.D.N.Y. 1966) which involved a simultaneous network telecast of a program by 162 affiliated television stations. Mr. Justice Fineberg characterized the damage provisions of Sec. 101 (b) of the Copyright Act of 1909, as "an ambiguous hodge podge of improvisations." He rejected an "unrealistic massing of $250 minimums" and stressed that the law can "preserv[e] flexibility [and] avoi[d] the possibility of ridiculous and injurious award . . ." See also, *Markham* v. *Borden*, 108 F. Supp. 695, 704 (D.C. Mass. 1952) rev. o. o. gr. 206 F.2d 199 (1st Cir. 1953) holding that a Court "must be careful to prevent the plaintiff from arbitrarily multiplying infringements, and thus compelling a defendant to pay damages greatly disproportionate to its actual wrongdoing.)

Similarly, the Register of Copyrights pointed out in his Copyright Law Revision Report submitted to the House Comm. on the Judiciary (87th Cong., 1st Sess.) p. 105:

> "We believe that the danger of exorbitant awards in multiple infringement cases is more theoretical than real."

Moreover, the fears expressed by petitioners are based on unsound assumptions. The grant of injunctions in copyright cases lies in the sound discretion of the trial courts. *Ideal Toy Corp.* v. *Fab-Lu Ltd.*, 360 F.2d 1021 (2d Cir. 1966); *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 198 F.2d 927 (2d Cir. 1952). The Senate Study on Copyright Law Revision, No. 24, 86th Cong. 2d Sess., Sen. Comm. Print, p. 127, states:

> The present law leaves it to the discretion of the court whether an injunction will be granted or denied. It has always been the rule of the courts that an injunction is an extraordinary remedy to be used only where further injury to the plaintiff is likely and the equities of the situation are on the side of the injunctive relief, and the courts have denied an injunction in cases where it was thought that this remedy would be unduly harsh on the defendant.

Accordingly, this Court can confidently leave to the sound discretion of the lower courts the determination whether or not to grant an injunction in a particular case and, if so, the terms on which such an injunction would issue, 17 U.S.C. §112.

Further, it should be noted that the apprehension voiced by petitioners as to the disastrous threat of damages to cable operators is not shared by the management, auditors and counsel of petitioner Teleprompter. In its annual report for the year 1971, petitioner Teleprompter in note 8 D attached to its Financial Statement, comments:

> "The Columbia Broadcasting System, Inc., and three other plaintiffs filed a suit in 1964 (since amended in 1969 and 1971) against the Corporation alleging that the Corporation reproduced, without authority, certain

> copyrighted programs. The Corporation denied infringement. The Trial has been completed but the Court has not yet issued its decision. In the event that the plaintiffs ultimately prevail, the amount of potential liability cannot now be predicted. *In the opinion of management, this action, if successful, would not have a material effect on the Corporation's financial position or operations.*" (Emphasis supplied.)

That the opinion expressed above was not a slip which had escaped the attention of counsel for petitioners is demonstrated by the note accompanying Teleprompter's Annual Report for the year 1972 which stated in regard to this litigation:

> "In the event that the plaintiffs ultimately prevail, *in the opinion of counsel for the Corporation,* the outcome will not have a material effect on the Corporation's financial position." (Emphasis supplied.)

The same optimistic view was expressed by Mr. David Foster, president of NCTA, who, following the decision of the Court below, stated that he was "pleased with the court's affirmation of the principle that cable TV reception service does not infringe on copyright" and that NCTA was pleased "that the courts have not permitted the copyright issue to interfere with the growth of the industry."[44] Apparently NCTA feels that it can live comfortably with the distinction made by the court below between CATV's reception service for local signals and the retransmission of those signals which the Court below defined as distant, and, therefore, held subject to the copyright law.

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[44] *Broadcasting,* March 12, 1973, p. 12.

POINT VI

The failure of Congress to act on the cable-copyright question can be traced to the intransigence of the cable industry following this Court's decision in *Fortnightly*. An affirmance of the decision below will greatly aid the adoption of CATV copyright legislation.

Many respected writers who have commented on the *Fortnightly* case have suggested that apart from the strictly legal question decided by the Court, an underlying policy assumption was that the then pending legislation to revise the Copyright Act would be enacted shortly. At the time of *Fortnightly*, the House of Representatives had passed an omnibus copyright revision bill and the bill was then pending in the Senate.

Unfortunately, following this Court's decision in *Fortnightly*, the bill did not progress any further in the Senate. To this date it remains buried in a Senate Subcommittee.[45] The reasons for Congressional inaction in the more than five years since *Fortnightly* can be traced directly to the bargaining imbalance struck as a result of that decision. Since the cable industry claims to be free from copyright liability under *Fortnightly*, it is naturally reluctant to support legislation which would impose such liability. And the evidence shows that it has been able to forestall any

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[45] Senator McClellan, Chairman of the Subcommittee on Patents, Trademarks and Copyrights, in introducing S. 644, 91st Cong., 1st Sess., said that "A principal factor delaying further Senate action on the copyright revision bill was the unresolved cable television issue," Cong. Rec., Feb. 8, 1971, pp. S. 962-S. 963. And in introducing S. 1361, 93rd Cong., 1st Sess., he stated "As is by now well known, any significant progress on general revision of the copyright laws has been effectively precluded in recent years by the multifaceted cable television issue," Cong. Rec., March 26, 1973, p. S. 5615.

legislative solution that would require the payment of any copyright royalties.

The conclusion to be drawn from the experience of *Fortnightly* is that a legislative solution will not be forthcoming if this Court again finds cable systems immune from copyright liability—this time in regard to distant signals. It is only the requirement of respecting copyright that will bring the cable industry to the halls of Congress to achieve a legislative solution. A review of the attempts to achieve a legislative solution makes this clear.

For the last several years, representatives of the CATV, broadcasting and motion picture industries acting at the suggestion and with the consent of the FCC, the Office of Telecommunications Policy and the Chairman of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, negotiated their differences. Their objective was twofold: (1) to resolve the controversy regarding the retransmission of distant signals by CATV stations and (2) to make joint recommendations to the Congress and to the FCC for appropriate copyright legislation and communication regulations.

In November, 1971, the parties reached a settlement which was incorporated into a formal written "Consensus Agreement" (Appendix D attached to the FCC's *Cable Television Report and Order, supra,* 36 FCC 2d 143 at 284-86 (1972). Both the representatives of the cable, broadcasting and program production industries who signed the agreement pledged themselves to support its full implementation by the Congress and the FCC.[46]

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[46] The Consensus Agreement was found to be in the public interest both by the FCC and by the Chairman of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary. Thus, in the *Cable Television Report and Order,*

Promptly after the settlement was signed, the FCC implemented the agreement and issued new regulations giving wide latitude to cable systems for the importation of distant signals.

It was because of the wide divergence of views between the parties on the appropriate amount of copyright fees that

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supra, 36 FCC 2d 143, 166-67 (par. 65), the FCC said in adopting its new cable rules:

> "We believe that adoption of the Consensus Agreement will markedly serve the public interest:
>
> (i) First the agreement will facilitate the passage of cable copyright legislation. It is essential that cable be brought within the television programming distribution market. There have been several attempts to do so, but all have foundered on the opposition of one or more of the three industries involved.
>
> It is for this reason that Congress and the Commission have long urged the parties to compromise their differences.
>
> (ii) Passage of copyright legislation will in turn erase an uncertainty that now impairs cable's ability to attract the capital investment needed for substantial growth. . . .
>
> It is important to emphasize that for full effectiveness the Consensus Agreement requires Congressional approval, not just that of the Commission. The rules will, of course, be put into effect promptly. Without Congressional validation, however, we would have to re-examine some aspects of the program. Congress we believe will share our conclusion that implementation of the agreement clearly serves the public interest."

In a letter to the Chairman of the FCC dated January 31, 1972 and incorporated as Appendix E into the FCC's *Cable Television Report, supra*, 36 FCC 2d 143, 286-7, Senator McClellan, Chairman of the Subcommittee on Patents, Trademarks, and Copyrights said:

> "As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties."

the Consensus Agreement specifically provided for an alternative method of setting these fees in the event that the parties should be unable to agree thereon. More specifically the Consensus Agreement provided (36 FCC 2d at 285):

> "Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the *legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.*" (Emphasis supplied.)

Shortly after the adoption of the Consensus Agreement, negotiating committees of the copyright owners and of the National Cable Television Association met in order to work out a mutually satisfactory license fee schedule. These meetings, however, had not as yet led to an agreement, when the District Court in the case at bar issued its decision on May 2nd, 1972, holding CATV systems not liable under the copyright law when they import programs from distant stations. The negotiators of the CATV industry, having by that time received from the FCC full implementation of the Consensus Agreement beneficial to them, saw no reason to cooperate further in supporting legislation which would subject them to the payment of royalties when the District Court had absolved them from such liability under existing law. CATV's stiffened attitude led to a breakdown of negotiations and to a request by the copyright owners for joint support in Congress of the arbitration clause contained in the Consensus Agreement. The CATV industry, however, refused to give such support and, in effect repudiated the agreement.

Copyright legislation appeared stalled until March 8, 1973 when the Court of Appeals reversed the District Court and held CATV distant signal importations to be subject to the copyright law. The result was a prompt resumption of legislative activity. On March 26, 1973, a new copyright revision bill was introduced in the Senate (S. 1361, 93rd Cong., 1st Sess.). Hearings were held shortly thereafter before the Senate Subcommittee on Patents, Trademarks, and Copyrights on July 31-August 1, 1973.[47] At the hearings Mr. Jack Valenti, president of MPAA, explained the failure of the CATV industry to live up to its obligations under the Consensus Agreement,[48] but nevertheless reaffirmed the copyright owners' continued resolution to abide by it:

> ". . . we did enter into an agreement. We pledged our support to it. We never wavered in that support, even though possibly we got a bad deal going in. But we signed it, and we honored it, and we stick by it.
>
> Senator Burdick. This is the so-called Consensus Agreement?
>
> Mr. Valenti. Yes, sir.
>
> Senator Burdick. And you are willing to honor it?
>
> Mr. Valenti. Yes, sir." [49]

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[47] *Hearings Before The Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, on S. 1361,* 93rd Cong., 1st Sess. (hereafter "Hearings").

[48] *Hearings, supra,* pp. 277-93. It should also be noted that under the proposed revision of Section 111 of S. 1361 offered by the copyright owners, any fee schedule adopted by an arbitration tribunal would not be effective for a period of twelve months after the enactment of copyright legislation. *Hearings, supra,* p. 313. In the unlikely event that an arbitration tribunal would render a decision prior to the expiration of twelve months following enactment of copyright legislation, the fee schedule would take effect as from the date of the tribunal's decision. *Id.*

[49] *Hearings, supra,* p. 291.

We respectfully submit that this unwavering support by *Amici* of legislation as agreed to by the interested parties regardless of whether the going is good or bad in the courts assures their continued cooperation regarding future legislation.

By contrast, the representatives of the cable industry made clear that they were repudiating the Consensus Agreement by rejecting compulsory arbitration of the fee question. Instead, they called upon Congress to set a minimum fee schedule, *Hearings, supra,* p. 420. Further, the testimony shows that substantial elements in the cable industry, relying on this Court's decision in *Fortnightly,* are fundamentally opposed to payment of any copyright fees whatsoever. *Hearings, supra,* p. 405.

Based upon the foregoing, we would respectfully urge this Court that a legislative solution of the problem will only be forthcoming if the decision of the Court below is affirmed. We think it significant that the hope for legislation which appeared promising following the Senate hearings, evaporated again in October of this year, when this Court granted the writ of certiorari in this case.

At the present time it is apparent that the Senate subcommittee will not take any further action on the bill during the first session of the 93rd Congress and spokesmen for the cable industry are now suggesting that copyright legislation will not be forthcoming until 1975.[50] Under these circumstances, it is abundantly evident that a decision in favor of the cable industry will probably destroy any opportunity for a legislative solution to the cable-copyright question. Conversely, a decision affirming the holding of the Court below, will revive the principles on which copy-

[50] *Broadcasting,* December 3, 1973, p. 7.

right protection has been based and greatly aid the adoption of CATV-copyright legislation.

CONCLUSION

***Amici* respectfully urge that the decision of the Court below be affirmed.**

Respectfully submitted,

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